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# Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

*Petitioner,*

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

*Respondent,*

*and*

UNITED STATES OF AMERICA,

*Intervenor-Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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# BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

## INTEREST OF *AMICUS CURIAE*

The Knights of Columbus submits this *amicus curiae* brief in support of respondent P.F. Flores, Archbishop of San Antonio, and intervenor-respondent the United States of America. The Knights, with the consent of all parties, shall address in this *amicus* brief the fourth question presented by the City of Boerne's brief: whether the Religious Freedom Restoration Act is constitutional under the Establishment Clause. *Amicus* urges this Court to hold that RFRA is a constitutional accommodation of religious exercise, and therefore does not run afoul of the Establishment Clause.

The Knights of Columbus is a charitable Catholic family fraternal organization of close to 1.6 million members and their families, totalling nearly six million people. Founded in New Haven, Connecticut in 1882 by Father Michael J. McGivney, the Knights of Columbus has grown into an international organization with some 11,000 local councils located in all 50 states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, Canada, Mexico, the Phillipines, and several other countries. The Knights of Columbus is the largest lay organization in the Roman Catholic Church.

Since its founding, the Knights of Columbus has been dedicated to several purposes: 1) rendering aid and assistance to its sick, needy, and disabled members and their families; 2) promoting social and intellectual discourse among its members and their families; 3) promoting and conducting educational, charitable, religious, social welfare, war relief, and public relief work; and 4) maintaining a life insurance program for the benefit of its members, their beneficiaries, and their families. Last year alone, the Knights contributed more than $105 million to charitable causes and provided roughly 50 million hours of volunteer service.

In addition, the Knights of Columbus has a long history of advocacy in this Court on issues of importance to the family and the Church, including those involving religious liberty. For example, the Knights underwrote the litigation in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). In this case, *amicus* has a strong interest in the Establishment Clause issue raised by the City of Boerne's challenge to the Religious Freedom Restoration Act. The Knights of Columbus defends the constitutional principle that all Americans may freely exercise their faith without hindrance and without punishment from the government. In addition to the government action this Court has held the Free Exercise Clause to require, the Knights of Columbus support further accommodation of religious belief and practice by Congress and the states. *Amicus* therefore opposes efforts such as the City of Boerne's — based on misinterpretations of the Establishment Clause — to hamper or erode the free exercise of religion.

## SUMMARY OF ARGUMENT

The Establishment Clause issue raised in this case is quite simple. It centers on the difference between the words "may" and "must" in the context of the First Amendment: *may* Congress enact laws that protect religious exercise beyond the level at which the Constitution dictates such exercise *must* be protected? The City of Boerne implicitly asks this Court to answer "no" — to hold that *only* accommodations of religion compelled by the Free Exercise Clause, as interpreted by this Court in *Employment Div. v. Smith*, 494 U.S. 872 (1990), can pass constitutional muster and that the Establishment Clause permits nothing more. Neither the text of the Constitution nor this Court's precedents support the curious notion that the Constitution permits only what it requires.

This Court's precedents firmly establish that the government may purposefully act to relieve burdens on the exercise of religion. "Where . . . the government acts with the proper purpose of lifting a regulation that burdens the exercise of

religion, we see no reason to require that the exemption come packaged with benefits to secular entities." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, is just such a regulation, with just such a purpose. RFRA fits comfortably within the wide field in the constitutional landscape identified by this Court and by others as a zone of permissible "accommodation" of religious exercise. Constitutional guarantees of individual rights, as interpreted by this Court, provide a floor — but not a ceiling — for the protection of those rights. This Court's holding in *Smith* defines, in part, the constitutional floor concerning religious liberty. However, nothing in *Smith* disturbed what the structure of the Religion Clauses and this Court's precedents have long dictated: that the Establishment Clause does not prohibit Congress and the states from enacting additional statutory protection for religious exercise.

The City of Boerne's odd argument that *Smith*, which prohibits the government from purposefully burdening religious exercise, somehow limits Congress's power under the Establishment Clause to purposely relieve burdens on the exercise of religion, fundamentally misconstrues that case. *Smith* held that "if prohibiting the exercise of religion . . . is not the object of [a general law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment [is] not offended." 494 U.S. at 878. But the case by no means held the converse — that government is somehow prohibited from lifting burdens on religion.

Therefore, while *Smith* addressed the contours of the Free Exercise floor, it did not establish a new Establishment Clause ceiling. RFRA lies between the constitutional floor and ceiling as a legitimate accommodation of religion under this Court's precedents. It merely adds an extra level of statutory protection to the Constitution's guarantee of religious liberty — a level of protection that is neither dictated by the Free Exercise Clause nor forbidden by the Establishment Clause.

Such discretionary legislative accommodation of religion has been unanimously upheld by this Court, *see, e.g., Amos*, 483 U.S. 327, and, indeed, was specifically *invited* by this Court in *Smith* itself, *see* 494 U.S. at 890.

The City's argument, therefore, that the Establishment Clause prevents Congress from accommodating religion beyond the requirement of the Free Exercise Clause is supported by neither law nor logic. It would deny Congress and the States any role in protecting religious liberty. It would also render unconstitutional many of the pre-*Smith* accommodations of religion that the former strict scrutiny Free Exercise test required, as well as virtually all of the discretionary legislative accommodations that it allowed. Surely this was neither the intent nor the holding of *Smith*. Rather, under *Smith*, the strict scrutiny accommodations that were formerly constitutionally compelled are still entirely permissible.

The City of Boerne correctly observes that RFRA differs in one respect from some other accommodations of religion previously upheld by this Court, in that it is a general rather than a specific accommodation for any and all religious exercise claims. This difference, however, hardly renders the statute constitutionally suspect. First, governmental exemptions from burdens on religious believers need not "come packaged with benefits to secular entities." *Amos*, 483 U.S. at 338. Second, RFRA's general applicability is a virtue rather than a vice under Establishment Clause jurisprudence, because it ensures uniform treatment for members of all religious faiths.

## ARGUMENT

## THE RELIGIOUS FREEDOM RESTORATION ACT IS A CONSTITUTIONAL ACCOMMODATION OF RELIGIOUS EXERCISE UNDER THE ESTABLISHMENT CLAUSE.

### A. There exists a wide area for accommodation of religion between government action that the Free Exercise Clause requires and government action that the Establishment Clause forbids.

This Court has consistently held that "the government may (and sometimes must) accommodate religious practices and . . . it may do so without violating the Establishment Clause." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987)). Further, "[i]t is well-established . . . that '[t]he limits of permissible state accommodation to religion are by no means co-extensive with the non-interference mandated by the Free Exercise Clause." *Amos*, 483 U.S. at 334 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970)).

The City of Boerne ignores this vital distinction between the accommodation of religion this Court currently holds that the Free Exercise Clause *requires* and the far greater accommodation of religion that the Establishment Clause *permits*. Petitioner purports to identify a constitutional violation in that RFRA's "plain purpose is to provide statutory protection for all substantial burdens on religion, whether constitutionally protected or not." Pet. Br. at 47. The City thus attempts to collapse the floor and ceiling between the two Religion Clauses of the First Amendment[1] and carries to an unprecedented extreme the view that the clauses are in direct conflict. Because the Free Exercise Clause does not mandate

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[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

RFRA, the City essentially argues, then Congress cannot constitutionally enact it.

The structure of the Constitution and the bulk of this Court's precedents, however, suggest a different approach — one more consistent with the widely held idea that the Religion Clauses do not clash, but rather complement one another, and that they have the same animating goal of protecting religious liberty. On this view, "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz*, 397 U.S. at 669. Indeed, it is well established that Congress[2] has wide latitude to enact protections for religious exercise.

This latitude has allowed what this Court and commentators from all perspectives have commonly acknowledged as the "accommodation" of religion though "government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion."[3] As Justice Brennan explained it, the "government [may] take religion into account . . . to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish." *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in the judgment) (footnote omitted).

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[2] Although this brief will refer only to capacities and limitations of Congress under the Religion Clauses, the same standards apply to the states under the incorporation of the First Amendment into the Fourteenth Amendment Due Process Clause. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (Establishment Clause).

[3] Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo.Wash. L. Rev. 685, 686 (1992) ("*Update*"); *see also* Laurence H. Tribe, *American Constitutional Law* § 14-5, at 1166-69 (2d ed. 1988); Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

*Smith* held that the Free Exercise Clause prevents government from burdening religious activity by "ban[ing] acts or abstentions only when they are engaged in for religious reasons, or only because of the religious beliefs they display." 494 U.S. at 877. This defines only the bare minimum of deference to religion owed by the government under the Constitution. It says nothing about whether the government may, in its discretion, affirmatively relieve burdens on religious exercise — a practice that this Court has long upheld. *See infra* Section B. Such accommodations of religion may be mandatory — that is, compelled by the Free Exercise Clause — or discretionary — that is, neither required by the Free Exercise Clause nor forbidden by the Establishment Clause. *See* Tribe, *supra* note 3, at 1168-69. The "zone of required accommodation recognizes that government's actions impinge on different persons in dramatically different ways, so that truly even-handed treatment at times compels exempting those whose religious beliefs are exceptionally burdened by a challenged state action." *Id.* at 1168. The same considerations counsel what has been called the "zone of permissible accommodation," *see id.* at 1169, or the "legislative" or "discretionary" accommodation, *see* McConnell, *Update*, *supra* note 3, at 686. The goal of such statutory accommodation is also to promote even-handed treatment for religious exercise, but at a level beyond the minimum dictated by the Free Exercise Clause.[4]

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[4] Much has been made of the fact that RFRA's language copies the language used by this Court in its constitutional strict scrutiny test, apparently in a farfetched attempt to claim that by using the same language in a statute, the words carry the same legal weight that they carried in this Court's interpretation of the Constitution. This is false. RFRA is plainly a statute. It is not a constitutional amendment. Even language repeated verbatim from the Constitution itself does not magically attain constitutional weight, in terms of the strength and priority of its legal command. *Compare, e.g.*, 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or

(continued...)

Nevertheless, the City of Boerne, relying on *Smith*, contends it is unconstitutional to accommodate substantial burdens on religion not already protected by the Free Exercise Clause. *See* Pet. Br. at 47. This proposition is absurd. It would mean that the two Religion Clauses are perpetually at war with one another, with a continguous but ill-defined boundary that shifts with each pronoucement of this Court on the requirements of either the Free Exercise or the Establishment Clause. As stated, this reading of *Smith* would render unconstitutional all previous accommodations granted under strict scrutiny analysis that arose from burdens not generated by laws directly targeting religious exercise — which is to say, almost all of them. Because the Free Exercise Clause no longer compels them, petitioner asks this Court to rule that the Establishment Clause affirmatively forbids them. *Smith* does not remotely dictate such a result.

### B. Accommodation in the form of specific exemptions for religious exercise does not violate the Establishment Clause.

Not only would the City's position make impossible accommodations previously mandated under the strict scrutiny Free Exercise test, it would also disturb a wide range of discretionary accommodations that have been granted by various government entities, and upheld by this Court, over the nation's history. This would be a monumental shift in Establishment Clause jurisprudence that has taken shape gradually, over time, by the accretion of accommodation precedents. Whatever *Smith* says about mandatory exemptions required by the Free Exercise Clause, it is irrelevant to the boundary at the other end of accommodation law: the

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[4] (...continued)
treaties of the United States.") *with* U.S. CONST. art. III. § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made,or which shall be made, under their Authority; . . .").

Establishment Clause still allows all the accommodation that this Court's precedents have held it to allow.

This Court unanimously held in *Amos* that Congress did not run afoul of the Establishment Clause in enacting a statute that exempted only religious institutions from the nondiscrimination requirements of Title VII of the Civil Rights Act. Acknowledging the argument that "an exemption statute will always have the effect of advancing religion" — an argument relied upon in essence by the City of Boerne, *see* Pet. Br. at 47 — this Court held that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." 483 U.S. at 335. Thus, "singl[ing] out religious entities for a benefit," *id.* at 338, is perfectly consistent with Establishment Clause principles.[5]

*Amos* leaves no doubt that, while the Free Exercise may not compel them, the Establishment Clause certainly does not forbid explicit accommodations of religious exercise. A number of accommodations of religion that have been first held not to be mandated by the Free Exercise Clause have subsequently been enacted by legislative action ultimately held

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[5] This Court's decision in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), does not impair the relevant principle in *Amos*. Although *Bullock* struck down a statute exempting only religious periodicals from a state sales tax, even the plurality opinion in that case made clear that "we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." *Id.* at 18 n.8. The accommodation in *Bullock* was struck down simply because, in that case, there was no "concrete need to accommodate religious activity . . . ." *Id.* at 18. While *amicus*, as well as various members of this Court and various legislatures, may disagree about the precise circumstances that counsel a permissive accommodation of religion, denial of an accommodation where there is no legitimate need demonstrated for such an accommodation hardly impairs the principle that accommodations *ought* to be granted, and *may* be granted, when there is such a purpose.

by the courts to comply with the Establishment Clause. For example, exemption from military service on the basis of conscientious objection to war has been held not to be a mandatory Free Exercise right, but this Court upheld a permissive, statutory accommodation granted by Congress. *See Gillette v. United States*, 401 U.S. 437 (1971); *Selective Draft Law Cases*, 245 U.S. 366 (1918). This Court held in *Goldman v. Weinberger*, 475 U.S. 503 (1986) that the First Amendment did not compel an exemption from military requirements for an Orthodox Jew who sought to wear his yarmulke with his Air Force uniform while on duty. Nothing in *Goldman*'s holding, however, prevented Congress from responding the very next year with a statute allowing just such a practice. *See* 10 U.S.C.§ 774. The exemption for Jewish merchants from a Sunday closing law, held not to be compelled in *Braunfeld v. Brown*, 366 U.S. 599, 609 (1961), was upheld against an Establishment Clause challenge in *Arlan's Dep't Store v. Kentucky*, 371 U.S. 218, 219-20 (1962). And, while *Smith* declined to find the right to a mandatory Free Exercise exemption for use of peyote in religious ceremonies, it noted that "a number of States have made an exception to their drug laws for sacramental peyote use." 494 U.S. at 890; *see also Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989) (upholding DEA exemption for religious use of peyote), *cert. denied*, 495 U.S. 906 (1990).

Permissive exemptions in the public school context have been particularly numerous and generous. They have been held to comport with the Establishment Clause as long as there is no coercion, sponsorship, or endorsement by the state. *Zorach v. Clauson*, 343 U.S. 306 (1952), upheld a New York City program releasing students from school for one hour per week to engage in prayer off the school premises. *Id.* at 312-14. This Court found that, to deny such a permissive accommodation on Establishment Clause grounds, it would be forced to "press the concept of separation of Church and State to . . . extremes." *Id.* at 313. There is no Establishment Clause violation when a legislature "respects the religious nature of

our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups." *Id.* at 314. Failing to allow such legislative accommodation "would be preferring those who believe in no religion to those who do believe." *Id.* The value and necessity of allowing Congress and state legislatures to respond to the needs of religious citizens in order to ensure equal treatment with nonbelievers retains vitality in this Court's more recent accommodation precedents. *See Hobbie*, 480 U.S. at 148 (Stevens, J., concurring) (quoting *Bowen v. Roy*, 476 U.S. 693, 707 n.17 (1986) (Stevens, J., concurring in part) (For government to treat "'religious claims less favorably than other claims'" is to subject "religious believers [to] unequal treatment.")

Nor does the state accommodation of the religiously motivated practice of schooling one's children at home violate the Establishment Clause, as this Court held in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Yoder*, which held that the state could not charge members of the Amish religion with violating a compulsory school attendance law for refusing to send their children to public school after the eighth grade, was followed by many other accommodations of religious exercise in the context of education. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993) (no Establishment Clause violation where public school uses federal IDEA funds to provide sign language interpreter for deaf student at Catholic high school); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-95 (1993) (no Establishment Clause violation to allow religious community group to show religious film in public school classroom after school hours); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (no Establishment Clause violation to Christian Club meeting on public secondary school premises); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (no Establishment Clause violation for blind student studying at Christian college to receive state assistance for vocational training); *Mueller v. Allen*, 463 U.S.

388 (1983) (no Establishment Clause violation where state provides tax deductions for certain educational expenses even if deductions primarily benefit children attending sectarian schools).

Several of the cases that have drawn these boundaries involve accommodation of religion in the form of state benefits to persons who are unemployed for religious reasons. For example, *Sherbert v. Verner*, 374 U.S. 398 (1963), held that the state was constitutionally compelled to grant unemployment benefits to a worker who lost her job for refusing to work on Saturday, her Sabbath. The strict scrutiny test developed in *Sherbert* repeatedly led this Court to hold that government refusal to award unemployment compensation to religious claimants violated the Free Exercise Clause. *See Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981). These cases make clear as an independent proposition that the accommodations involved do not violate the Establishment Clause. Extending unemployment benefits to Saturday worshipers "'reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent the involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.'" *Hobbie*, 480 U.S. at 145 (quoting *Sherbert*, 374 U.S. at 409).

The City of Boerne does not suggest outright — nor, to the knowledge of *amicus*, has any other litigant before this Court or any other court — that this significant and growing body of caselaw approving accommodations of religion has been overruled. *Smith* cannot possibly mean that accommodations for Saturday Sabbath, home schooling, conscientious objection to war, and wearing of yarmulkes in the military now violate the Establishment Clause. These religious accommodations are all still valid. And *Smith* plainly invited further legislative accommodations of religious exercise:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. This invitation from the Court was quite clear: the question of whether religious practices ought to be accommodated by the government is a matter to be resolved by the political process — the very process that gave birth to RFRA.

### C. RFRA's general legislative accommodation of religious exercise comports on its face with the Establishment Clause.

Petitioner's challenge to RFRA is a facial one; thus *amicus* need only contend here that the statute comports on its face with the Establishment Clause. The City faces an onerous burden in raising its facial challenge to a Congressional statute, yet it offers no convincing Establishment Clause rationale that would render RFRA facially unconstitutional.

First, as a matter of simple logic: if case-by-case accommodations of religious exercise are valid under the Establishment Clause, then there is no reason why a general legislative exemption is not also constitutionally sound on its face. The City of Boerne asserts in its brief that across-the-board exemptions are problematic, *see* Pet. Br. at 47, but it gives no reason for this conclusory statement other than that the "sheer breadth and substantive strength of RFRA necessarily 'advance' religion." Pet. Br. at 47. If this is so, then the "sheer strength and breadth" of this Court's accommodation precedents must "advance religion." Indeed,

the strongest and most general pronouncement — the Free Exercise Clause itself — would by this logic "advance religion."

Nevertheless, the City of Boerne attempts to tag RFRA with a violation of the Establishment Clause test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which held that to be constitutional, a statute must have a secular legislative purpose, must have a principal primary effect that neither advances nor inhibits religion, and must not foster excessive government entanglement with religion. *Id.* at 612-13. While it is questionable whether the *Lemon* test is still the appropriate analytical tool in Establishment Clause cases, *Lemon* is certainly the most stringent analysis potentially applicable to this case. Yet RFRA easily passes even the *Lemon* test.

As support for its contention that RFRA flunks the first prong of *Lemon*, petitioner claims: "The plain purpose is to provide statutory protection for all substantial burdens on religion, whether constitutionally protected or not." This implies that the City believes there is something wrong — indeed, something unconstitutional — about the government affording any protection beyond the Free Exercise minimum to those whose religious practice is substantially burdened. Under this analysis, virtually all permissive accommodations of religion, both before and after *Smith*, would fail the *Lemon* test.

Again, this cannot be. Many of the important cases upholding accommodations of religion — including the unanimous decision of this court in *Amos* — were decided after the *Lemon* test was instituted in 1971. Therefore, *Lemon*'s nonestablishment test could hardly condemn religious accommodation. With regard to *Lemon*'s secular purpose requirement, it is well-established that protecting explicitly religious exercise is indeed a perfectly respectable secular purpose. Accommodations of religious exercise necessarily take religion specifically into account. This does not mean, however, that they work an unconstitutional establishment of

religion. Accommodations do not promote any favored religious exercise by the government, but rather allow individuals and groups to exercise sincerely held convictions without government interference. "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to [violate the Establishment Clause], it must be fair to say that the government itself has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337.

The many accommodations upheld by this Court as constitutionally valid are conscious of religion, respectful of it, and even deferential to it. In each case, accommodation is distinguishable from establishment of religion because the government merely steps out of the way of religious exercise: it does not coerce, lead, or even suggest any religious practice or conviction. This crucial difference makes cases of accommodation easily distinguishable from cases of impermissible establishment.

The City further faults RFRA because its protection of religious exercise is not "narrowly tailored . . . [as] contemplated by the Court in *Smith*." Pet. Br. at 47. Again, the City cites no law other than the "contemplations" of the *Smith* majority to support this allegedly fatal constitutional defect. Furthermore, far from being a defect, RFRA's generality promotes equal treatment for all religious exercise claims. While the specific religious exemptions this Court has granted in the past remain perfectly constitutional, none of this Court's holdings prevent Congress or the States from neutrally granting such exemptions to all religions. Indeed, RFRA's general accommodation of religious practices ensures neutrality so that all claims for religious accommodation will receive equal respect from the government. *See, e.g., Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Goldman v. Weinberger*, 475 U.S. 503, 512 (1986) (Stevens, J., concurring) (emphasizing the constitutional principle of advancing "uniform treatment for the members of all religious faiths").

As to the second prong of *Lemon*, the City claims that RFRA fails the "neutral effect" test because its "sheer breadth and substantive strength . . . necessarily 'advance' religion." Pet. Br. at 47. Again, RFRA pales in strength beside the weight of this Court's accommodation precedents and beside the Free Exercise command in the Constitution itself. On *Lemon*'s third, "entanglement" prong, the City argues that RFRA entangles "every government . . . [that] must investigate whether [a] law will be the means of accomplishing its goal that is the least restrictive of every religion's requirements" — something that will entail "extensive investigation into the theological requirements of every relevant religion." Pet. Br. at 48. Petitioner paints a daunting picture of the research RFRA would require, but the demands on government bodies will be no different from the demands pre-*Smith*. The strict scrutiny inquiry has not proven to be overwhelming in the past. Those with legitimate claims for religious exemptions will doubtless do the legwork and bring their "theological requirements" to the attention of the relevant authorities. And even if RFRA does entail a bit of extra work, it hardly amounts to a constitutional violation but is rather the price that Congress, as the representative legislative body in this country, has decided is appropriate to accommodate the demands of a religiously pluralistic society. If that society later decides RFRA is too burdensome, it can demand change from Congress.

Finally, the City of Boerne claims that RFRA runs afoul of the Establishment Clause test in *Lee v. Weisman*, 505 U.S. 577 (1992), which prohibits government from endorsing the message of a particular religion. *Id.* at 587. The City maintains that RFRA "endorses a global message: the government likes religion" and that this endorsement "violates the fundamental constitutional requirement of neutrality on issues of conscience." Pet. Br. at 48. Again, RFRA epitomizes neutrality: it does not play favorites among those seeking accommodations. Thus, it is every bit as compatible with the Establishment Clause as are the myriad religious

accommodations long upheld by this Court. The City articulates no standard under which these discrete accommodations are constitutionally acceptable, but RFRA's across-the-board accommodation is not. Therefore, all its Establishment Clause objections would condemn equally every specific accommodation ever granted or allowed by this Court.

The constitutionality of accommodating religious exercise is well settled. RFRA does nothing more.

## CONCLUSION

This Court should hold that the Religious Freedom Restoration Act does not violate the Establishment Clause.

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